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SUBJECT: METI SOLICITING PUBLIC COMMENTS ON STRENGTHENING TRADE  
SECRET PROTECTIONS

¶1. Summary and Action Request: The Ministry of Economy, Trade and Industry (METI) is soliciting public comments on the contents of a recent draft report from its Industrial Structure Council's Intellectual Property Subcommittee. Among other measures, this report recommends stronger efforts to protect Japan's trade secrets during criminal prosecution of infringement of such secrets. A copy of the Japanese language version of the report has been emailed to EAP/J, as well as to Michael Beeman and Eric Holloway at USTR's Japan Office. Embassy requests any USG comments on the report be transmitted sufficiently in advance of the Ministry's deadline for comments of 5:00 PM (Tokyo time) Friday, January 30, 2009 to allow for translation and appropriate formatting. End Summary and Action Request.

¶2. In its most recent recommendations under the bilateral Regulatory Reform Initiative (RRI) Cross-Sectoral Working Group, the USG urged Japan to "introduce a new procedure that will ensure that the content of a trade secret will not become open to the public in a criminal trial for trade secret theft." During the December 2008 RRI meetings, METI informed the U.S. delegation the Ministry's Industrial Structure Council was studying the issue and a draft report was imminent. The Ministry released the report, prepared by the Council's Intellectual Property Policy Working Group Subcommittee on Technical Information Protection, December 27, 2008 and is now soliciting public comments on the contents.

¶3. The bulk of the Sub-committee's thirteen-page report, entitled "Possible Courses of Action on the Review of Criminal Prosecution of Trade Secret Theft", highlights the need to strengthen Japan's laws against trade secret theft, whether directly or via long-distance means such as the Internet. The report noted when the GOJ recognized the crime of trade secret infringement in 2003 by amending Article 21 of the Unfair Competition Prevention Law, the government intentionally set the legal pre-requisites for the crime very cautiously, as the concept was new to Japan's criminal code. Since that time, however, companies that are victims of trade secret theft have become increasingly reticent or hesitant to report the crime for fear their secrets could be revealed in court proceedings. The report concludes that amidst the global business environment, "failure to improve the current situation regarding criminal prosecution of theft of trade secrets could lead to the stagnation of domestic industry and deterioration of the international competitiveness of domestic companies."

¶4. As to the specific measures to prosecute trade secret theft and protect trade secrets during the court proceedings, the report notes, "the legal system that protects trade secrets held by companies should be built upon acknowledgement of the important role of trade secrets in modern society, and after due consideration of their proprietary nature, regulations and laws need to be sufficiently effective in such situations." Based on such considerations, "new legal measures to prevent trade secrets from becoming public during criminal court process should be considered

as expeditiously as practicable".

15. The Sub-committee's report acknowledges Article 82 of the Japanese Constitution guarantees defendants the right to open trial. Nevertheless, the subcommittee finds, "it is undeniable that the interests of the victims of trade secret theft may be undermined if the contents of relevant trade secrets become public during the court process. Under current criminal court procedures there are no special measures to prevent relevant trade secrets being revealed during the trial process. Therefore, at present, owners of trade secrets have no choice but to depend on the ingenuity of prosecutors, the presiding judge's control of litigation, and utilization of existing procedures to protect their rights."

16. While such measures could be effective in some cases, the report also points out that "in the current situation it is not possible to fully assuage the uneasiness and uncertainty of having to depend on the cooperation and understanding of those involved in managing court cases" and "there are limitations to the use of control of litigation under existing procedures." The Subcommittee therefore discussed such tangible proposal as: (1) allowing judges to decide to eliminate oral presentation for issues concerning the content of trade secret; (2) allowing examination of witnesses outside the trial date in the case where the relevant trade secret may be revealed; and (3) establishing rules to clarify specific requirements to limit publicity of a trial, defined under the main clause of the Paragraph 2, Article 82 of the Constitution. "A study of legal measures to protect trade secrets during criminal court process concerning the crime of infringement of trade secret is necessary, from the perspective of the protection of trade secrets that could be deemed to be extremely valuable, with due consideration to the need for publicity of a trial, while ensuring not to disrupt the facilitated court process. Therefore, the

Ministry of Justice (MOJ) and METI should jointly consider the tangible concept, and aim to compile a concrete final draft as expeditiously as practicable", the report concludes.

17. In addition to measures related to court proceedings, the draft report also recommends the GOJ consider other measures to strengthen criminal prosecution of trade secret theft, including: (1) strengthening penalties for the theft of trade secrets by encroaching the management systems established by the trade secret owners; (2) modification of the legal requirement for determining the crime of trade secret infringement from the current legal basis of "using the secrets for the purpose of unfair competition" to "using the secrets for the propose of providing benefits for the infringer directly, or for the benefit of a third party outside the company, or for the purpose of causing damage to the company"; (3) criminalizing certain types of trade secret theft, such as "illegal obtaining of trade secrets by those responsible for the management of those secrets, for dishonest purposes, in contravention of their specific management responsibilities"; and (4) separate criminalization of the use or disclosure of trade secrets that are obtained illegally.

SCHIEFFER